No. 84-1340

(16)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BREZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan and RICHARD SURBROOK, President and DON PENSION, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee membership today includes former Attorneys General of the United States, former presidents of the American Bar Association, law school deans, and many of the nation's leading lawyers. The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting the fundamental rights of the people of the United States.

The Lawyers' Committee and the ACLU strongly support the right of a local school board to seek to achieve a well-integrated faculty, whether that action is undertaken to improve the quality of education through a more diversified teaching staff, as a voluntary desegregation effort that furthers our nation's commitment to nondiscriminatory policies in education, or in fulfillment of an affirmative obligation to desegregate a school system. Inasmuch as the Jackson Board of Education acted pursuant to such goals, the Lawyers' Committee and the ACLU file this brief amici curiae in support of the Board.[1]

STATEMENT OF THE CASE

This case is before the Court in a highly unusual posture. Although the case was disposed of by the district court on cross-motions for summary judgment, no discovery was taken and no facts were adduced; instead, both the Board of Education and the teachers agreed that

[1] All parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court.

evidentiary materials presented and facts agreed to in two earlier related proceedings, *Jackson I* and *Jackson II*,[2] should be relied on by the district judge in resolving the present dispute. Such an agreement is not unusual inasmuch as the previous proceedings involved similar parties and similar issues; understandably, in such circumstances the parties did not wish to bear the expense of retrying matters that had already been tried in the earlier cases.

What *is* unusual is that the parties did not make *explicit* in the trial court which materials from *Jackson I* and *Jackson II* they wished the court to treat as undisputed matters and which, if any, they did not. Based on the parties' ambiguous representations on this issue, the district judge apparently elected to treat *all* the matters presented in *Jackson I* and *Jackson II* as properly before him in this case. No objection was raised to this approach by any party either in the district court or the court of appeals. Nonetheless, in their brief before *this* Court, the teachers (petitioners) now appear to dispute what is and is not part of the record and what is and

[2] The earlier related proceedings were *Jackson Education Association Inc. v. Board of Education of the Jackson Public Schools*, No. 4-72340 (E.D. Mich. 1976), J.A. 30, *et seq.*, and *Jackson Education Association Inc. v. Board of Education of the Jackson Public Schools*, No. 77-011484CZ (Jackson County Cir. Ct. 1979), J.A. 39 *et seq.* We refer to them here as *Jackson I* and *Jackson II*, respectively. In *Jackson I*, the Jackson teachers' union brought suit in federal court against the Board for its failure to follow the layoff clause here at issue; the Board defended primarily on the same grounds advanced by the teachers in the present case, including the contention that the layoff clause is unconstitutional. After a trial on the merits, the federal court declined to resolve any of the issues presented, but relegated the parties to the state court. J.A. 37.

In *Jackson II*, the ensuing state court proceeding, the parties agreed upon a record consisting of a stipulation of facts and set of exhibits from *Jackson I*. J.A. 41. On the basis of that record, the state court resolved the merits of all claims and held, among other things, that the layoff clause is constitutional. J.A. 53. That state court decision on the merits was never appealed.

is not agreed to as undisputed fact.[3] Thus, there are two matters this Court must resolve before reaching the constitutional question at issue: (1) what is "the record" before the Court; and (2) what are the facts in that record pertinent to the constitutional question. We address those two matters in turn.

1. *The Record*

In the district court, both parties filed summary judgment motions and briefs in which they proffered a "statement of facts" and claimed that there was no dispute between them about those facts.[4] They repeated this claim at oral argument on the motions[5] and in their briefs in the court of appeals.[6]

[3] For example, petitioners alleged below only that there had been "no finding of past employer discrimination in the hiring of teacher personnel on the part of the Jackson School Board, by a governmental agency competent to rule on such matters." Complaint ¶ 21. They did not dispute, however, the existence of findings by the Board of Education that the school district was segregated (Information Circulated to Jackson Citizens, April 10, 1972, Concerning School Integration Efforts, Plaintiffs' Exhibit 8 answer to question 7, Joint Pre-Trial Order, *Jackson I*), or the fact that the court in *Jackson II* found that the existence of disproportionately small numbers of minority teachers in the Jackson schools discriminated against minority students. J.A. 52. Nonetheless, petitioners now contend, incorrectly, that "[t]here is no violation of student rights in the Jackson School District" and no discrimination in education. Petitioners' Br. 11.

[4] *See* Plaintiffs' Motion for Summary Judgment at ¶ 3 ("[t]his case presents no genuine issue as to any material fact"); Plaintiffs' Brief in Support of Motion at 1 (stating that " 'there is no dispute as to the facts' ") ("Plaintiffs' Br."); Defendants' Motion for Summary Judgment at ¶ 5 ("there is no dispute as to the facts"); Defendants' Brief in Support of Motion for Summary Judgment at 1-6 ("Defendants' Br.").

[5] *See* Transcript of District Court Hearing of February 23, 1982 ("Feb. 23, 1982 Tr.") at 2, 5-6.

[6] Brief of Plaintiff-Appellants at 2 ("Trial was not held and facts were generally not disputed"); Brief of Defendant-Appellees at 2 ("Trial was not held and facts were generally not disputed").

The undisputed facts upon which the parties relied and the district court based its opinion were taken directly from the findings made and evidence adduced in *Jackson I* and *Jackson II*. The parties clearly assumed that the present case would be decided on the basis of its historical context as that context was established in the earlier, related proceedings. Both respondents and petitioners referred repeatedly to the factual findings and evidence in *Jackson I* and *Jackson II* in their briefs in support of their motions for summary judgment.[7] Accordingly, the district judge concluded that the entire history of this case—as that history is established in *Jackson I* and *Jackson II*—was properly before him: "The roots of this case reach nearly thirty (30) years into the past. It will be helpful, in coming to grips with the problems posed by this case, to review that past."[8]

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[7] For example, respondents' lengthy statement of facts quoted freely, and without citation, from the deposition of Superintendent Lawrence Read, which was admitted into evidence in *Jackson I*, and from the uncontroverted testimony given in *Jackson I* by Kirk Curtis, the former Executive Secretary of the Jackson County Education Association. Defendants' Br. 2, 5. Indeed, respondents specifically stated that their recitation of the facts was derived from the undisputed evidence and findings in *Jackson I* and *Jackson II*. Defendants' Br. 6. Petitioners, too, referred to the findings in the earlier proceedings, noting that the state court in *Jackson II* found that there had been societal discrimination against black teachers, Plaintiffs' Br. 2, and, at oral argument before the trial court, petitioners declined to object to the statement of facts as set forth in respondents' brief. Feb. 23, 1982 Tr. 5-6.

[8] Pet. App. 20a. Furthermore, the judge specifically noted that the "past" (as established in *Jackson I* and *Jackson II*) had been summarized in respondents' brief and was "not disputed by the plaintiffs." *Id.* Petitioners cannot now controvert those undisputed facts and may not now lodge new facts with this Court. As this Court held in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 362 n. 16 (1973), a party cannot disavow admissions made before the district court when that party "fail[ed] to controvert those admissions by affidavit" and "consistently maintained . . . that no factual matters remained unresolved." The Court therefore concluded that summary judgment was properly granted. *Id. See also United States v. Dooley*, 424 F.2d 1067 (5th Cir. 1970) (where

Even if the parties did not agree to the inclusion of the full record of *Jackson I* and *Jackson II* in this case, the district court was authorized to take judicial notice of those records and rely upon them in reaching its decision. In *Butler v. Eaton*, 141 U.S. 240 (1891), this Court took judicial notice of the record in a prior related proceeding. Federal courts have relied extensively on this decision, holding that they "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue," even if the records of those proceedings have not been offered into evidence.[9]

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appellant's counsel stated at oral argument that there was no dispute as to the facts, the appellate court construed this as a concession that the facts were not in dispute so that the trial court could properly consider entry of summary judgment); *Allison v. Mackey*, 188 F.2d 983, 984 (D.C. Cir. 1951) (trial court correctly considered admissions made in the points and authorities filed in support and opposition to a motion for summary judgment in rendering its decision); *United States Hoffman Machinery Corp. v. Richa*, 78 F. Supp. 969, 971-72 (W.D. Mo. 1948) (trial court relied upon admissions of counsel made at oral argument in deciding motion to dismiss).

[9] *St. Louis Baptist Temple v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (federal court took judicial notice of records in related state court proceeding which involved different parties, even though those records had not been offered into evidence). *Accord Nahtel Corp. v. West Virginia Pulp & Paper Co.*, 141 F.2d 1, 2 n.2 (2d Cir. 1944) (appellate court took judicial notice of the entire record of an earlier proceeding even though the parties had stipulated to only a portion of the record). *See also Landy v. F.D.I.C.*, 486 F.2d 139, 150-51 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974) (appellate court took notice of judicial proceedings occurring after the appeal was lodged); *Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971), *cert. denied*, 404 U.S. 967 (1972) (appellate court took judicial notice of judicial proceedings occurring after the appeal was noticed); *Ellis v. Cates*, 178 F.2d 791, 793 (4th Cir. 1949), *cert. denied*, 339 U.S. 964 (1950) (trial court took judicial notice of a proceeding by one of the parties in a prior related case); *Ins. Co. of N. Am. v. Nat'l Steel Service Center, Inc.*, 391 F. Supp. 512 (N.D. W. Va. 1975) (court took judicial notice of its own records of prior litigation related to the case before it); *Daley v. Sears, Roebuck & Co.*, 90 F. Supp. 562, 563 (N.D. Ohio 1950) (court took

For these reasons, although our description of the facts below relies primarily on the parties' summary judgment briefs and supporting affidavits, the record now before this Court includes all the uncontroverted evidence presented in *Jackson I* and *Jackson II*.

2. *The Facts*

Until 1953, there were no black teachers in the Jackson public schools.[10] In that year, a black woman, hired in a group of 61 new teachers, became the only black teacher on a teaching staff of 355.[11] The number of minority teachers increased slowly thereafter from one in 1953-54 to ten (1.8%) in 1960-61 to twenty-four (3.9%) in 1968-69.[12] In 1968-69, 15.2% of the students in the Jackson schools were minority students.[13] The racial composition of the individual elementary schools varied, however, between 0% and 86% minority, with four schools having no minority students and some having as few as 14% white students.[14]

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judicial notice of the record in an earlier related proceeding brought by the plaintiff). *See generally* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.11[9] (2d ed. 1985); 9 J. Wigmore, *Evidence* § 2579 (Chadbourn rev. 1981).

[10] Affidavit of Jane I. Phelps, August 11, 1982 at 1 ("Phelps Aff."). Defendants' Br. 1.

[11] Phelps Aff. 1-2. Defendants' Br. 1.

[12] Phelps Aff. 1. Defendants' Br. 1 (citing data provided by Howard E. Thompson, Director of Personnel, Jackson Public Schools, Plaintiffs' Ex. 15, Joint Pre-Trial Order, *Jackson I*). All of the exhibits to the Pre-Trial Order were admitted into evidence in *Jackson I*. *See* Transcript of District Court Proceedings of March 31, 1976 ("*Jackson I* Tr.") at 8.

[13] Phelps Aff. 1. Defendants' Br. 1.

[14] Report of Citizens' Advisory Committee, May 14, 1970, Plaintiffs' Ex. 2, Joint Pre-Trial Order, *Jackson I*. The Board of Education had redistricted the attendance zones for the high schools and junior high schools in 1963 and 1969 in order to ensure that the racial composition in each of these schools was roughly equivalent to that of the district as a whole.

Prompted in part by "[v]arious complaints" filed by the Jackson NAACP with the Michigan Human Rights Commission "alleging segregation of elementary schools as well as discriminatory treatment in staff hiring and placement," the Board initiated steps in the summer of 1969 to desegregate the elementary schools by redrawing the student attendance zones and hiring more minority teachers.[15] An *ad hoc* committee of teachers, school administrators and faculty union representatives was formed to study the Board's alternatives in achieving both of these objectives.[16] The Board received the committee's report in October 1969 and adopted as Board policy the committee's recommendations and findings.[17]

The committee's "priority recommendation" was that, within a year, the faculties of each of the school district's elementary schools include at least two minority persons.[18]

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[15] Defendants' Br. 1 (noting *inter alia* Complaint No. 6485-ED filed with the Michigan Civil Rights Commission by the Jackson NAACP on March 24, 1969).

[16] Defendants' Br. 1.

[17] Defendants' Br. 1-2. *See also* Deposition of Lawrence Read, Superintendent of Schools, May 16, 1975 at 10-11 ("Read Dep.") ("[the committee's recommendations] were the guiding principles for the Board when it went through the whole process in the next two or three years of attempting to desegregate the schools"). The Read Deposition was admitted into evidence in *Jackson I*. *Jackson I* Tr. 5.

[18] Defendants' Br. 2 (quoting Recommendations for Elementary School Redistricting, Jackson Public Schools Ad Hoc Committee, October 9, 1969, Plaintiffs' Ex. 1, Joint Pre-Trial Order, *Jackson I*) ("integrative experiences" designed to help achieve the goal of "full and complete integration" should be accomplished within the next twelve months including "an integrated staff at each elementary school with a minimum of two minority group teachers in each school"). Other recommendations included: inclusion of multi-ethnic materials in the curriculum, development of professional staff awareness of minority group problems through training and other growth experiences and increased communication with the community, and achievement of better inter-school experiences in which children of all races could interact. *Id.*

At that time, only three of the district's elementary schools had even two minority teachers, and there were so few minority teachers in the system that to implement the recommendation the Board would have had to hire forty new teachers immediately.[19] Recognizing that the recommendation, therefore, could not be implemented in a year, the Board obtained the Jackson Education Association's approval to seek minority personnel actively and to establish a goal of 15% minority faculty in each school building.[20]

The Board also adopted a policy in 1970 calling for complete integration of the school system.[21] The Jackson Board of Education and the Education Association were both committed to the goal of faculty integration as an important part of the school district's "grand plan" for

[19] Phelps Aff. 2. Defendants' Br. 2.

[20] This policy was incorporated as one clause in the 1970-72 professional negotiations agreement. Read Dep. 63-64. The 15% goal was roughly equivalent to the minority student population and would have ensured the presence of two minority teachers in each elementary school building. *See* Testimony of Kirk Curtis, Executive Director of the Jackson County Education Association, *Jackson I* Tr. 46-47 ("Curtis Testimony"). Such a goal, *i.e.*, one related to the racial composition of the student population, is consistent with principles and procedures for the integration of schools promulgated by the Michigan State Board of Education. *Guidelines for Providing Integrated Education within School Districts*, Michigan State Board of Education, June 1977 (reprinted in the Appendix to the court's opinion in *Berry v. School Dist. of Benton Harbor*, 467 F. Supp. 721, 735-50 (W.D. Mich. 1978) ("*Michigan Guidelines*") (desegregation plans should include "if necessary, affirmative action plans which would change the racial composition of staff in the district to reflect the racial composition of students").

[21] Read Dep. 15 ("December of 1970, the Board adopted . . . a very elaborate statement . . . on its commitment to the desegregation or integration of the Jackson Public Schools"). This statement was adopted pursuant to a Report of the Citizens' Advisory Committee, May 14, 1970, Plaintiffs' Ex. 2, Joint Pre-Trial Order, *Jackson I*, that found *inter alia* that "the education of black children can best be furthered by integration of the curricula and the teaching staff throughout the district." Read Dep. 14-15.

achieving a "truly integrated school system."[22] Moreover, both the Board of Education and the union agreed that Jackson had an *affirmative obligation* to implement a desegregation plan designed to overcome past discrimination against teachers and eliminate racial isolation of students in the schools.[23]

Affirmative recruiting in pursuit of these objectives increased the proportion of minority teachers employed by the Board of Education from 3.9% in 1969-70 to 8.8% in 1971-72.[24] It soon became clear, however, that teacher layoffs in 1970 and 1971 (forced by the school district's

[22] School officials determined that integration of the teaching staff particularly was "educationally sound and beneficial" and would "assist in the education of the children in the community." Read Dep. 76-77. There was "virtual unanimity" among the teachers in the union that there was a "need for black teachers" in the system and the union leadership expressed the view that "it is a great deal of help to both students and other staff in a particular school to have a mixed staff of minority teachers. . . ." Curtis Testimony, *Jackson I* Tr. 42, 56. Under state policies, faculty integration is an important aspect of school desegregation. The 1966 Joint Policy Statement of the State Board of Education and Michigan Civil Rights Commission on Equality of Educational Opportunity provides in part:

> [S]egregation of students in educational programs seriously interferes with the achievement of the equal opportunity guarantee of this State and . . . segregated schools fail to provide maximum opportunity for the full development of human resources in a democratic society . . . . [E]very effort shall be made to prevent and to eliminate segregation of children and staff on account of race or color. . . . Staff integration is a necessary objective to be considered by administrators in recruiting, assigning and promoting personnel.

Michigan Guidelines, note 20 *supra*, 467 F. Supp. at 747-748.

[23] Defendants' Br. 16 ("The defendants JPS and JEA recognized that students in the school district have a right to a single, multiracial school district. In order to obtain an education in an integrated school, it was just as necessary to have an integrated faculty as it was to have an integrated student body. Therefore, the parties adopted an affirmative action plan").

[24] Phelps Aff. 2. Defendants' Br. 3.

declining student population and generally adverse economic conditions in Jackson and in Michigan) threatened to wipe out completely even these limited gains.[25] The collective bargaining agreement then in effect generally required that the last hired be the first fired.[26] The Board and the teachers' union both recognized that, unless they found some way to assure new minority hires a measure of job security, their efforts to recruit new minority teachers would be crippled and their faculty desegregation goal unreachable.[27] Moreover, another complaint had been filed with the Michigan Human Rights Commission, there had been a "violent (racially motivated) explosion" at one of the high schools,[28] and the NAACP was prepared to file suit if a plan designed to remedy all aspects of segregation in the schools was not implemented.[29] The Board was convinced that further affirmative steps had to be taken and a lawsuit avoided.[30]

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[25] Defendants' Br. 3. *See also* Read Dep. 24 ("when you went into the meeting place with the pink-slipping, you saw a lot of black faces there. As a matter of fact, it did literally wipe out all the gain that had been made in terms of affirmative action to bring that about"); and Curtis Testimony, *Jackson I* Tr. 20 ("each year when there were layoffs well, all of the newly recruited minority staff members were swept into the layoffs every year").

[26] Defendants' Br. 3.

[27] *Id. See also* Read Dep. 69 (without layoff protections, "[e]verything else is in danger, if not destroyed"); Curtis Testimony, *Jackson I* Tr. 55-56 (I don't see how you can fulfill a goal . . . if you can't recruit them").

[28] Defendants' Br. 4 (quoting Read Dep. 36).

[29] Read Dep. 44 (the NAACP "was ready to go into Federal court and get a court order, as happened in Kalamazoo").

[30] The Board distributed a series of questions and answers to the community that explained why integration should not come only after a lawsuit:

> Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system. Firmly established legal precedents mandate a change. . . . Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law.

Question 4, Information Circulated to Jackson Citizens April 10, 1972 Concerning School Integration Efforts, Plaintiffs' Ex. 8, 1-2, Joint Pre-Trial Order, *Jackson I*.

Given these circumstances, the Board and the union entered contract negotiations in 1972 determined to find a solution to the problem that seniority-based layoffs posed to fulfillment of their mutual commitment to increased hiring of black teachers.[31] Under the proposal they adopted,[32] which ultimately was incorporated in Article XII of the collective bargaining agreement,[33] teachers would still be laid off in reverse seniority order within their building or grouping, except minority teachers would not be laid off at a percentage rate greater than their percentage representation in the school system prior to layoff. Teacher certification would still be relevant in all assignments,[34] and previous teaching assignments and education might be relevant to a layoff decision in a given case.[35] Thus, despite the operation of the new layoff pro-

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[31] Read Dep. 28-39.

[32] The Board first proposed a complete freeze on minority layoffs until the goal of 15% minority staff was reached. Curtis Testimony, *Jackson I* Tr. 31. The union proposed a less drastic measure effecting a limited modification of seniority rights designed to protect the gains made in desegregating the system's teaching staff by ensuring consideration of race in layoff decisions. *Id.* at 35.

[33] Defendants' Br. 3-4. This clause has been included in all successive labor contracts between the teachers' union and the Board. J.A. 12 at n.2.

[34] Article VII A, 1972-73 Professional Negotiations Agreement, J.A. 14.

[35] Article IX of the 1972-73 professional negotiations agreement established that, in addition to seniority, a teacher's building assignment, grouping (TEAM leaders, art, music, physical education, and various special education and vocational educational subdivisions, etc.), subject, grade level, speciality type, type of teaching certification, identified majors and minors of academic study and past

tections for minority teachers, the new contract did not establish an absolute racial preference.[36] The teachers in the union ultimately ratified the agreement, including the minority layoff protections, because such protections were deemed necessary to "correct the past problems" and "without some modifications in the seniority system, we certainly weren't going to achieve the goals we were talking about before." [37]

In the spring of 1973, the Board of Education notified teachers that reductions in staff would be necessary and some teachers were laid off.[38] The layoffs were effected by following the provisions in the 1972-73 professional negotiations agreement.[39] Layoffs again were necessary in the spring of 1974,[40] but this time the Board refused to implement fully the minority layoff provisions in the agreement.[41] Instead, the Board laid off white probationary teachers but not white tenured teachers even though this caused a reduction in the number of minority teach-

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successful teaching assignments all could play a role in the determination whether to displace the teacher, and any one of the factors ultimately might control whether the teacher was laid off particularly at the middle school and high school levels. J.A. 23-24. Moreover, in certain circumstances, the bumping provisions of Article IX, J.A. 26-27, guaranteed more senior teachers the right to assume positions held by less senior teachers for which they were certified and qualified.

[36] Defendants' Br. 22.

[37] Curtis Testimony, *Jackson I* Tr. 42. Defendants' Br. 5 ("[t]he leadership explained that a staff racial mix was educationally sound and that the system needed black teachers. It was also noted that the new layoff policy was partially designed to remedy past discriminatory policies").

[38] Phelps Aff. 2. Defendants' Br. 5.

[39] *Id.*

[40] Defendants' Br. 5. *See also* Curtis Testimony, *Jackson I* Tr. 51.

[41] *Id.*

ers.[42] As a consequence, two minority teachers, who should have been retained under the layoff provision in the contract, joined the Jackson Education Association in filing *Jackson I*, the first of the three lawsuits concerning the validity of the minority layoff protections.[43] As earlier discussed, all claims ultimately were dismissed in *Jackson I*, but the constitutionality of the layoff provision was upheld by the state court in *Jackson II*.

In layoffs after *Jackson II*, the Board adhered to the terms of the collectively-bargained layoff provision, a course of conduct commanded by the state court's decision. This course of conduct ultimately led to petitioners' receipt of layoff notices in 1976 and 1981 [44] and to this lawsuit.

SUMMARY OF ARGUMENT

The Jackson Board of Education has a compelling interest in eliminating student and faculty segregation in the public schools and an equally compelling interest in providing its public school students with an integrated education in which all students have equal access to a racially diverse educational experience. The Jackson Board of Education initially sought to achieve its goal of integrating the Jackson faculty primarily through aggressive efforts to recruit new minority faculty. The record in this case shows, however, that seniority based layoffs in the early seventies threatened to "wipe out" entirely the minimal gains in minority hiring the Board had been able to make, and continued application of a rigid seniority-based layoff clause would impede significantly future recruiting efforts.

In this context, a collectively bargained contract provision that protects some newer minority teachers from lay-

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[42] Defendants' Br. 5. *See also* Curtis Testimony, *Jackson I* Tr. 52.

[43] Defendants' Br. 6.

[44] *Id.*

offs clearly was necessary to advance the Board's compelling purposes. Moreover, the layoff provision challenged in this case is carefully crafted to serve the Board's important objectives and does not infringe unnecessarily the rights of non-minority teachers. The layoff provision represents a slight modification of the existing seniority system that has been ratified consistently by the teachers' union. Race is not the sole factor that determines who will be laid off under the contract. Other factors, including an individual's teaching certification, qualifications and current assignment may enter into an individual layoff decision. Minority teachers are only protected from layoff to the extent necessary to assure the continued success of the school system's recruiting efforts. Furthermore, the layoff provision is not in force indefinitely. It has been reviewed several times since its adoption in 1972, and it is again subject to renegotiation in 1988 when the current collective bargaining agreement expires. For all these reasons, it is clear that the layoff provision challenged here is constitutional, and the judgment below should be affirmed.

Alternatively, the Court may now wish to exercise its discretion to decline further review of this case. Careful examination of the record below reveals that the question tendered by petitioners for review is not in fact presented. This case furthermore does not present a new, important issue for this Court to decide. Rather, it is clear from the record that this is a school desegregation case that concerns only questions well settled in this Court's previous decisions. In addition, there is some ambiguity regarding the content of the record now before this Court. This ambiguity may lead the Court to decide it is inappropriate to attempt to resolve any significant constitutional question through a review of this case. Finally, it appears that the lower court may have abused its discretion by deciding a constitutional question that may well have been mooted if state law claims made by petitioners had been resolved.

ARGUMENT

I. THE LOWER COURTS' DETERMINATION THAT THE SCHOOL BOARD ACTED CONSTITUTIONALLY SHOULD BE AFFIRMED

This Court appears to be divided regarding the standards against which the Board's actions in this case should be tested. Some Members of the Court would hold that, inasmuch as the layoff provision at issue classifies persons on the basis of race, the provision must be subjected to the strictest scrutiny, *i.e.*, that the provision must serve a "compelling" governmental interest and the provision must be "necessary" to the achievement of that interest.[45] Other Members of the Court would hold that where, as here, the racial classifications are "benign," the layoff provision should be tested by a less exacting standard, *i.e.*, that it serve an "important" governmental objective and be "substantially related" to the achievement of that objective.[46] The Court need not determine which of the two standards should apply here. The layoff provision at issue in this case easily meets the stricter standard. It was designed to serve not one but two compelling governmental interests, and it was necessary to achieve either of those interests.

A. The Layoff Provision was Designed by the School Board to Meet its Duty to Desegregate the Schools as well as to Improve Education in the Schools Through a More Diversified Faculty.

In order to review the constitutionality of the challenged layoff provision, the Court must look beyond the facts surrounding the layoffs of these petitioners in 1976 or 1981. Rather, as the district judge recognized, "the

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[45] *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting, joined by Rehnquist, J.); *id.* at 537 (Stevens, J., dissenting).

[46] *Bakke*, 438 U.S. at 359 (Brennan, J., joined by White, Marshall and Blackmun, J.J.); *Fullilove*, 448 U.S. at 518-19 (Marshall, J., joined by Brennan, White, and Blackmun, J.J.).

roots of this case reach nearly thirty (30) years into the past." Pet. App. 20a. And, as the judge further recognized, the only way the Board—and now this Court—may "com[e] to grips with the problems posed by this case," is to "review the past." *Id.* That past is not a flattering one to the Board, but it is one the Board has taken significant steps to correct.

The record demonstrates that until 1953 not a single black teacher was hired in the Jackson school system. Indeed, as late as 1968-69 fewer than 25 black teachers had been hired, representing only 3.9% of the total faculty of 610. Even then, these few black teachers were disproportionately assigned to predominantly black schools. Furthermore, as late as 1968-69—when the overall composition of the Jackson system's student body was approximately 15% black—there were still schools in the system that had no black students and some that had almost no white students. Given this history, it is not surprising that at about this same time the Board was faced with findings of discrimination against it by the Michigan Civil Rights Commission, threats of lawsuits to require desegregation of its schools, and racial disturbances in the schools. It is also not surprising that the Board decided it had to take some action to address this problem; indeed, it would have been irresponsible had the Board decided otherwise.

Under these circumstances, the Board decided two things: first, that it arguably had a legal obligation to desegregate the Jackson schools;[47] and second, that such desegregation, whether legally required, was a step that

[47] *See* note 30 *supra*. Whether the Board was correct in its assessment of its duty under federal law, at least one Michigan federal court has suggested that Michigan law required the Board to act affirmatively to integrate racially segregated schools even if the segregation was not caused by the school district. *Berry v. School Dist. of Benton Harbor*, 467 F. Supp. at 733-734 ("any school official who fails to remedy segregation in his district, no matter the cause of the segregation, is committing an act of discrimination in violation of . . . the Michigan Constitution").

was "educationally sound and beneficial" and necessary to assure equality of education in the schools.[48] Both of these purposes required the Board to take steps to increase the number of minority faculty in the school system,[49] and both constitute compelling governmental interests.

There can hardly be doubt at this late date that the first of the Board's purposes—taking affirmative steps to desegregate its schools and rid them of the last vestiges of racial discrimination—constitutes a compelling governmental interest. Indeed, this objective constitutes a fundamental national policy of the highest order.[50] Further, it is well settled that local school boards may "*voluntarily* adopt desegregation plans which [make] express reference to race if this [is] necessary to remedy the effects of past discrimination. *McDaniel v. Barresi*, 402 U.S. 39 (1971)."[51] Any other rule, *i.e.*, one that prohibited school boards from desegregating their schools until they were *ordered* to do so by a court, would be directly contrary to this Court's holding in *Brown II* that "[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving [such] problems . . . ." *Brown v.*

[48] *See* note 22 *supra*. The Board's determination was consistent with and presumably based in part on 1966 findings of the State Board of Education that "segregation . . . interferes with . . . the equal opportunity guarantee of this State" and fails "to provide maximum opportunity for the full development of human resources." *Michigan Guidelines*, note 20 *supra*.

[49] Desegregating faculties is a key component of school desegregation. *See United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 231-32 (1969) ("faculty . . . desegregation [is] a goal that we have recognized to be an important aspect of the task of achieving a public school system wholly free from racial discrimination"); *Singleton v. Jackson Municipal Separate School Dist.*, 419 F.2d 1211, 1217-18 (5th Cir. 1969) (en banc) (per curiam), *cert. denied*, 396 U.S. 1031 (1970) (faculty desegregation plan ordered as the first step in conversion to a unitary school system).

[50] *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("[g]overnment has a fundamental, overriding interest in eradicating racial discrimination in education").

[51] *Bakke*, 438 U.S. at 362-63 (Brennan, J., joined by White, Marshall and Blackmun, JJ.).

Board of Education, 349 U.S. 294, 299 (1955) (emphasis supplied). It is only where "school authorities fail in their affirmative obligations" that "judicial authority may be invoked." [52]

The Board's laudable decision in this case was, therefore, to take steps to set right its own previous history before a court ordered it to do so. As the Board stated publicly:

> Waiting for what appears the inevitable only flames passions and contributes to the difficulties of an orderly transition from a segregated to a desegregated school system . . . . Waiting for a court order emphasizes to many that we are quite willing to disobey the law until the court orders us not to disobey the law.[53]

It is true, of course, that the Board never publicly announced itself guilty of past illegal conduct; but it would be unrealistic and counterproductive to require a school board to confess illegality in order for it to be eligible to take steps necessary to improve its students' education.[54] As Justice Brennan wrote for the Court in *Weber* concerning Title VII of the Civil Rights Act of

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[52] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). Any other rule would also be contrary to this Court's strong commitment to voluntary compliance with the purposes of the Fourteenth Amendment. *See W.R. Grace & Co. v. Int'l Union of United Rubber Workers*, 461 U.S. 757 (1983).

[53] *See* note 30, *supra*. This approach by the Board anticipated Justice Brennan's opinion in *Bakke*:

> [O]ur society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a *last* resort to achieve the cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.

438 U.S. at 364 (emphasis supplied) (citation omitted).

[54] *Cf. United Steelworkers of Am. v. Weber*, 443 U.S. 193, 210-11 (1979) (Blackmun, J., concurring) (company that had "arguably" engaged in past discriminatory practices could legitimately take steps to remedy such practices).

1964, "it would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." 443 U.S. at 204. The same may be said with even greater force of the Fourteenth Amendment: it would be a supreme irony if that Amendment—which *constitutionalized* this nation's concern over centuries of racial injustice—were read to *prohibit* a state's efforts to set right part of that injustice.

This record shows furthermore that the Board intended to serve a second compelling governmental interest—improving education in the Jackson schools through the integration and diversification of its faculty. The Court's unanimous decision in *Swann v. Charlotte-Mecklenburg Board of Education* validated the special power of school boards to adopt voluntary race-conscious educational measures:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities* . . . .

402 U.S. at 16 (emphasis supplied). The Court underscored this view in *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), when it declared that "school authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable *quite apart from any constitutional requirements.*" *Id.* at 45 (emphasis supplied).[55] While these decisions deal with a school

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[55] The educational value of racial diversity in schools was also at the heart of Justice Powell's decision in *Bakke*. There he recog-

board's authority to improve education through development of *student-body* diversity, it necessarily follows, as the lower courts have held unanimously, that a school board's authority extends as well to the development of diversity in the *faculty*.[56]

These then are the two interests the Board of Education intended to serve when it took steps—including adopting the challenged layoff provision—to hire and

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nized a state university's compelling interest in achieving a racially diverse student body. 438 U.S. at 314. Such diversity is important, Justice Powell explained, as a means to promote other important societal interests, such as students' improved ability to live and work in a heterogeneous society. *Id.* at 312-13.

The latest reaffirmation of the compelling governmental interest in promoting racial and cultural diversity in public schools appeared in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). In *Seattle*, the Court held that a state initiative limiting a school board's power voluntarily to transport students to promote racial integration violated the Equal Protection Clause. In so holding, the Court specifically emphasized a school board's interest in and authority for developing diversity within a school:

> [W]hen [the children's] environment is largely shaped by members of different racial and cultural groups minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," . . . while, we may hope, teaching members of the racial majority to "live in harmony and mutual respect" with children of minority heritage.

458 U.S. at 472-73 (citations omitted).

[56] *See, e.g., Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 906 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985) (upholding a faculty desegregation plan on the grounds that "a school district is competent to choose" such a plan "to further educational goals"); *Zaslawsky v. Bd. of Educ.*, 610 F.2d 661, 664 (9th Cir. 1979) (upholding faculty integration plan voluntarily adopted by school board against challenge by white teachers); *Porcelli v. Titus*, 431 F.2d 1254, 1257 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) (upholding plan for hiring a supervisory faculty adopted voluntarily by school board to bring proportion of black supervisors closer to that of black students).

maintain greater numbers of minority faculty in the school system. Since these two interests are compelling governmental purposes within the meaning of this Court's decisions, the only remaining issue is whether the particular provision that occasioned petitioners' layoffs was necessary to achieve those purposes.

B. The Steps Taken by the School Board, Including Its Agreement to the Layoff Provision, Were Reasonable and Necessary to Achieve Desegregation of the Schools and Diversification of the Faculty.

Given the Board's two purposes—desegregating its schools and diversifying its faculty in order to improve its students' education—it is unquestionable that the Board *had* to take *some steps* to recruit and maintain additional minority faculty members. As earlier discussed,[57] the school superintendent and the president of the teachers' union recognized that aggressive recruiting efforts alone would not result in an integrated faculty. Without some means for assuring new minority hirees that they would have some measure of job security, the Board would be prevented from recruiting sufficient numbers of minority teachers. Moreover, the operation of the layoff clause threatened to wipe out even the minimal gains in hiring that had been made.[58] It was these circumstances that caused the Board and the union to agree on the necessity of the layoff provision here at issue.

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[57] *See* p. 10, *supra*.

[58] *See* discussion at notes 25-27, *supra*. Petitioners contend that a seniority-based layoff would not have resulted in a substantial diminution in the percentage of minority teachers on the staff in 1981. Petitioners' Br. 37. They base this claim on a reading of the 1981 seniority list included in the Joint Appendix. J.A. 57-100. Because qualifications and certifications also enter into layoff judgments, counting the names on the 1981 list backwards does not tell this Court anything reliable about which teachers of what race would or would not have been laid off. In any event, given its purposes, it was surely within the Board's discretion to determine that *no* diminution of minority faculty was acceptable.

The approach adopted by the Board and the union is "limited and properly tailored" and its impact on petitioners is "an incidental consequence of the program, not part of its objective." *Fullilove v. Klutznick*, 448 U.S. at 484. As the Chief Justice noted in *Fullilove*, "[i]t is not a constitutional defect in [such a] program that it may disappoint the expectations of non-minority [individuals]. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.* (*quoting Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777 (1976)). Several factors demonstrate the careful tailoring of the Board's actions in this case.

First, the layoff provision does not contravene vested contractual rights of the petitioners or of any other teacher.[59] This Court has expressly recognized that parties to a collective bargaining agreement may agree to "enhanc[e] the seniority status of certain employees" in order to further "public policy interests" even if no statute requires such action and even if the enhancement of some employees' seniority rights would operate to disturb the expectations of others.[60]

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[59] It is well settled that employees do not have "vested property rights" in a particular seniority system. Cooper and Sobol, *Seniority Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1605 (1969); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (approving good faith modification of seniority rights); *Cooper v. General Motors Corp.*, 651 F.2d 249 (5th Cir. 1981) (seniority does not exist apart from the collective bargaining agreement). *See generally* Brief for Respondents at 34-41. Furthermore, the court in *Jackson II* specifically found that the layoff provisions here at issue do not conflict with any tenure rights recognized under Michigan law. J.A. 46-47.

[60] *Franks v. Bowman Transp.*, 424 U.S. at 778-79. Moreover, the Court has acknowledged that this is particularly so where, as in this case, the purpose of the modification of seniority rights is to "ameliorat[e] the effects of past racial discrimination, a national policy objective of the 'highest priority'." *Id.* at 779 (quoting *Pellicer v. Bhd. of Ry. and S.S. Clerks*, 217 F.2d 205 (5th Cir. 1954), *cert. denied*, 349 U.S. 912 (1955)).

Second, the fact that the Board and the teachers' union have agreed year after year to the layoff provisions at issue is an indication that the provision—the product of give and take in the collective bargaining process—has been tailored as closely as possible to meet the purpose to be achieved.[61] Nothing in the record remotely suggests that the union has not fully and fairly represented the interests of its members (which include petitioners) when it has negotiated and approved the layoff provisions. Moreover, Jackson teachers have been almost unanimous in their support of the Board's objective of increasing the numbers of minority faculty.[62]

Third, the layoff provision is not absolute and is not based on race alone. Rather, under the collective bargaining agreement, a variety of other factors, including teachers' certification, qualifications and grade assignment, may enter into a layoff decision and any of these factors may be determinative of a layoff in a given case. In addition, *all* teachers, both black and white, are subject to layoff under the terms of Article XII.[63] Minority teachers are laid off on the same terms as majority teachers, *i.e.*, in proportion to their respective percentage representations on the teaching staff.

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[61] Contracts including the challenged provision have been ratified six times since 1972 when the provision was first adopted. Brief for Respondents at 32 n.24. As this Court has recognized, seniority systems that reflect the "give and take of free collective bargaining . . . inevitably come in all shapes and sizes," and "[i]t does not behoove a court to second-guess either the process or its products." *California Brewers Ass'n v. Bryant*, 444 U.S. 596, 609 (1980).

[62] *See* note 22, *supra*. It should also be remembered that in *Jackson I* and *Jackson II* the union sued on behalf of its members to enforce the provisions here at issue.

[63] Thus, although the layoff provision accords all minority teachers a "plus," it is the combined weight of ethnicity, certification and qualifications that ultimately determines which teachers are subject to layoff under the provision. *See generally Bakke*, 438 U.S. at 315-19.

Finally, the layoff clause is narrowly tailored in that it is of limited duration and is periodically reviewed. The current collective bargaining agreement expires in 1988. If at that time the Board or the union decides that minority-teacher protections are no longer necessary to desegregate the schools or to diversify the faculty, either party is entirely free to negotiate modifications to the provisions here at issue; there is no reason to expect that they will not continue to monitor the necessity for these provisions as they have in the past.

Thus, the school board in this case, validated by the periodic agreement from the teachers' union, has taken reasonable and necessary steps to achieve government interests of paramount importance. Those steps may not have been *the only* approach that the Board and the union might have chosen to solve the very difficult problem they faced, but their approach or something like it was necessary if the school district's compelling need to recruit and maintain black teachers was to be met. Some degree of deference is due to the judgment that the Board and the union reached together on this matter. It is, after all, *the school board* that is entrusted in the first instance with the duty both to "formulate and implement educational policy"[64] and to "elucidat[e], asses[s], and solv[e]" the problem of school desegregation.[65] That is the duty the Board has met in this case.

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[64] *Swann*, 402 U.S. at 16.

[65] *Brown II*, 349 U.S. at 299. In difficult matters such as these, "[t]here is no universal answer to [such] complex problems . . . ; there is obviously no one plan that will do the job in every case." *Milliken v. Bradley*, 433 U.S. 267, 287 (1977) (quoting *Green v. County School Board*, 391 U.S. 430, 439 (1968)). In choosing the plan to do the job, therefore, at least where the plan chosen by the board is reasonable, is carefully tailored, has been consistently approved by the union, and has proved workable, this Court should be reluctant to strike it down as unconstitutional. In such circumstances, as this Court has often made clear, local school boards must be given a measure of discretion in setting the educational goals for their district's school children. *Bd. of Educ. of Island Trees v. Pico*, 457 U.S. 853, 863 (1982) (plurality opinion) (Brennan, Marshall, and Stevens, JJ.) ("Court has long recognized that local school boards have broad discretion in the management of school affairs"); *Id.* at 890 (Burger, C.J., Powell, Rehnquist, and O'Connor, JJ., dissenting) (school boards rather than judges should exercise discretion in matters of educational policy); *Id.* at 894 (Powell, J., dissenting) ("[s]tates and locally elected school boards should have responsibility for determining the educational policy of the public schools").

We urge the Court to affirm the constitutionality of its actions.

II. ALTERNATIVELY, THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

While the constitutionality of the Board's actions is clear on this record, nevertheless there are significant reasons why this Court may choose to decline review of this case: (a) the record does not raise the question presented for review in the petition for certiorari; (b) there is ambiguity as to the facts which properly may be considered in reviewing the Board's actions; and (c) the lower courts abused their discretion in deciding the constitutionality of the Board's actions because the petitioners' state-law claims may moot the constitutional issue. We briefly summarize each of these reasons below.

A. The Record Does Not Present the Question Raised in the Petition.

The question petitioners raised in their petition and have now briefed on the merits is whether "the Constitution tolerate[s] racial preferences for teacher layoffs adopted by a public employer in the absence of findings of past discrimination, based solely upon a disparity between respective percentages of minority faculty and students." For at least four reasons, that question is not presented by the record before this Court.

First, as *petitioners' complaint* in the district court alleged, the layoff provisions of Article XII were certainly not "based solely" upon a percentage disparity between minority faculty and students, but were based primarily

on two purposes: remedying past societal discrimination [66] and assuring the presence of "role models for minority students" in the school system.[67] More specifically, as respondents' brief in the district court stated,[68] "the new layoff policy was partially designed to correct past discriminatory policies" and "one of the reasons why both the School District and the association voluntarily agreed to the contractual layoff provision" was to assure "the exposure of students to [diverse] groups . . . ." [69] Hence, on no construction of this record can it fairly be said that the layoff provisions were "based *solely*" on perceived percentage disparities between minority students and faculties.

Second, as our earlier discussion demonstrates, not only were the layoffs in this case based on considerations *other* than percentage disparities between minority students and faculty, but in fact those layoffs were almost totally *unrelated* to such disparities. Pursuant to Article XII of the collective bargaining agreement—the article that triggered the layoffs at issue in this case—layoffs of more senior white teachers were authorized *only* to assure "that at no time will there be a greater percentage of minority personnel layoffs than the current percentage of minority personnel employed at the time of the layoffs." In other words, Article XII operated simply to maintain the proportion of minority faculty at whatever level it stood when the layoffs occurred.[70] Contrary to

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[66] Complaint ¶ 20.

[67] Complaint ¶ 32.

[68] As earlier discussed, the district court adopted the statement of facts from respondents' summary judgment brief and noted that those facts were not disputed by the petitioners. Pet. App. 20a.

[69] Defendants' Br. 5, 32.

[70] According to data from outside the record cited by petitioners, the percentage of minority faculty in 1980-81 when most of the disputed layoffs occurred was 13.4%, J.A. 108, and the percentage of minority students was 24.2%. J.A. 104. Thus, the percentage

the implications of the question raised by petitioners, there is no authority in the Board, and none was exercised here, to lay off teachers in order to achieve a parity between the percentage of minority faculty and students.

Third, and again contrary to the implications of the question posed by petitioners, race is *not* the sole factor used to determine layoffs. Rather, the collective bargaining agreement requires the Board to take into account such factors as curriculum needs and the staffing and educational requirements of particular schools—along with race—in making most layoff determinations, particularly at the middle school and high school levels.[71]

Finally, although the question presented asserts that the Board acted "in the absence of findings of past discrimination," the record shows that not to be so. The state court in the *Jackson II* proceeding specifically found that past societal discrimination had contributed to the underrepresentation of minority faculty in the Jackson school system and, furthermore, the Board itself determined that its past policies may well have been discriminatory.[72]

This Court may have granted certiorari believing that this case raised a new, important issue that the Court had not had an opportunity to review before, *i.e.*, whether a state employer may constitutionally lay off employees for racial reasons, solely to achieve some arbitrary racial balance in its work force, and without any indication of past discrimination. As we have shown, no such issue is raised in this case. This is a desegregation case in which a school board has taken balanced steps to desegregate and diversify its faculty to improve its students'

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rate of minority teachers maintained by the layoff provision was *substantially below* the percentage of minority students in the student body.

[71] *See* note 35 and p. 23, *supra*.

[72] *See* p. 18, *supra*.

education. This situation is one the Court has dealt with time and again, and it is one the Court has specifically declined to review anew in several recent cases.[73] That being so, dismissal of the writ is appropriate.[74]

B. The Scope of the Record is Unclear.

Although the conduct of the parties in the trial court apparently established the content of the record, this matter is not free from doubt. No specific stipulation of facts was filed by the parties in the trial court and no explicit incorporation of the *Jackson I* and *Jackson II* records occurred. Instead, both parties simply filed summary judgment briefs in which they proffered a "statement of facts" clearly drawn from matters in *Jackson I* and *Jackson II*. This procedure arguably leaves unclear which matters this Court may consider in deciding the issue raised by the case. In such circumstances, with critical ambiguity affecting resolution of a fundamental con-

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[73] *See Kromnick v. School Dist. of Philadelphia*, 739 F.2d at 905 ("[t]he integration of faculty is a means to improve the quality of education of those who have suffered the effects of racial prejudice and segregation"); *Arthur v. Nyquist*, 712 F.2d 816, 823 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 3555 (1984) (upholding layoff restrictions giving preference to minority teachers as an "equitable solution" that would allow the school children to "enjoy the benefits of a significantly . . . integrated faculty"); *Morgan v. O'Bryant*, 671 F.2d 23, 27 (1st Cir.), *cert. denied*, 459 U.S. 827 (1982) (upholding layoff restrictions giving preference to minority teachers in order to protect the rights of the school children to an equal education).

[74] *See Ramsey v. New York*, 440 U.S. 444 (1979) (per curiam) (certiorari dismissed as improvidently granted because "it has become evident that on the record in this case it cannot be said with any degree of certainty that this question is actually presented"); *Belcher v. Stengel*, 429 U.S. 118 (1976) (per curiam) (certiorari dismissed because the question framed in the petition was not presented by the record); *McClanahan v. Morauer & Hartzel*, 404 U.S. 16 (1971) (per curiam) (same); *Needelman v. United States*, 362 U.S. 600 (1960) (per curiam) (same).

stitutional question, it is well settled that the Court should not undertake review of the question.[75]

C. The Constitutional Issue Should Not Have Been Decided.

Even if a constitutional issue which the Court wishes to review is fully and fairly presented on the record, there remains one final reason why the issue may not be appropriate for review by this Court. Petitioners, in addition to raising the constitutional issue in their complaint, also alleged numerous violations of state law and a violation of the collective bargaining agreement itself.[76] These claims were renewed by petitioners in their brief in the court of appeals.[77] Had any of these pendent state law claims been sustained by the lower courts, those claims would have obviated the need to reach the constitutional issue now presented to this Court. In such circumstances, it is well settled that the constitutional issue should not have been reached.[78]

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[75] *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) ("[i]n view of ambiguities in the record as to the issues sought to be tendered, . . . the writ of certiorari is dismissed as improvidently granted"). *See Minnick v. California Dept. of Corrections*, 452 U.S. 105, 127 (1981) ("because of significant ambiguities in the record," the writ of certiorari is dismissed); *Cowgill v. California*, 396 U.S. 371, 372 (1970) (Harlan, J., concurring) (constitutional issue dismissed "based on the inadequacy of the record for deciding the question presented"); *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947) (appeal dismissed where underlying constitutional issue not presented "in clean-cut and concrete form").

[76] Complaint ¶¶ 1, 15, 17, 18 and 19 (asserting violations of the state tenure act and a failure to "follow the layoff procedures outlined in the collective bargaining agreement").

[77] Plaintiffs-Appellants' Br. 19 (asserting violation of the Michigan Teacher Tenure Act).

[78] *See, e.g., Spector Motor Services, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable").

Rather, it was an abuse of discretion for the lower courts to fail to entertain the state law claims first; only if those claims did not fully resolve the matter should the constitutional issue have been considered.[79]

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment below or, alternatively, should dismiss the writ as improvidently granted.

Respectfully submitted,

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[79] *Schmidt v. Oakland Unified School Dist.*, 457 U.S. 594 (1982); *Hagans v. Lavine*, 415 U.S. 528, 547 (1974). Alternatively, the district court might simply have relegated the parties to the state courts for resolution of both the state-law claims and the constitutional claims. We take no position on the question whether the lower court should have decided the state law claims first, or, alternatively, have decided no claims at all. Our position is simply that in no event should the constitutional issue have been reached.